EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Supreme Court, U.S.
FILED
MAY 14 1992
OFFICE OF THE CLERK

ORIGINAL (2)

RESPONSE REQUESTED
Corrected Form 1
affidavit

No. 91-1426

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

THE PEOPLE OF THE STATE OF CALIFORNIA, Petitioner

v.

STEPHEN ROSS HARDEN, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL
SIXTH APPELLATE COURT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS BY RESPONDENT

RUDY KRAFT
P.O. Box 225
Cutten, CA 955334
(707) 445-5486
(Counsel of Record)

SIXTH DISTRICT APPELLATE
PROGRAM
100 N. Winchester Blvd.
Santa Clara, CA 95050
(408) 241-6171

Attorneys for Respondent

32 pp

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS BY RESPONDENT

Stephen P. Harden, the respondent, respectfully moves the Court for leave to proceed herein in forma pauperis, in accordance with the provision of Title 28, United States Code, section 1915, and Rule 39 of this Court, and to file herein his response to the petition for writ of certiorari to California Court of Appeal, Sixth District filed by petitioner in single counterpart, without printing the same. The typed brief of respondent in opposition is presented herewith for filing.

The affidavit of counsel for respondent in support of this motion is filed herewith.

Dated May 14, 1992.

Respectfully submitted,

RUDOLPH G. KRAFT, III
P.O. Box 225
Cutten, CA 95534
(707) 445-5486
(Counsel of Record)

SIXTH DISTRICT APPELLATE PROGRAM
100 N. Winchester Blvd.
Santa Clara, CA 95050
(408) 241-6171

Attorneys for Respondent

No. 91-1426

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

THE PEOPLE OF THE STATE OF CALIFORNIA, Petitioner

v.

STEPHEN ROSS HARDEN, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL
SIXTH APPELLATE COURT

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

RUDY KRAFT
P.O. Box 225
Cutten, CA 955334
(707) 445-5486
(Counsel of Record)

SIXTH DISTRICT APPELLATE
PROGRAM
100 N. Winchester Blvd.
Santa Clara, CA 95050
(408) 241-6171

Attorneys for Respondent

State of California

County of Humboldt

Rudolph G. Kraft, III, being duly sworn, on oath deposes and says:

1. He is the attorney for respondent in the above-entitled action and makes this affidavit in support of the respondent's motion for leave to proceed in forma pauperis herein.

2. This court ordered respondent to file a response to petitioner's petition for a writ of certiorari to the California Court of Appeal, Sixth District.

3. Respondent is unable because of his poverty to pay fees and costs of this case or give security therefor.

4. Respondent's attorney fees and costs on appeal have been paid by the State of California on account of respondent's poverty.

I swear under penalty of perjury that the foregoing is true and correct.

RUDOLPH G. KRAFT, III.
Attorney for Respondent

Subscribed and sworn to before me this 13th day of May, 1992.

CHRISTINE SINTIC
Comm. # 963686
NOTARY PUBLIC - CALIFORNIA
Humboldt County
My Comm. Expires Apr. 6, 1996

QUESTION PRESENTED

In addition to the question presented in the petition, respondent suggests the following additional question:

Should this court consider an issue which was not raised at the trial court or on appeal?

TABLE OF CONTENTS

	PAGE
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	3
THE TESTIMONY OF THE OFFICERS	3
THE DEFENDANTS' TESTIMONY	4
UNDISPUTED FACTS	4
MAGISTRATE'S FINDINGS	6
ARGUMENT	10

TABLE OF AUTHORITIES

	PAGE
CODES	
U.S.C. Section 1257, subsection (a)	1
California Health and Safety Code	
Section 11377, subsection (b)	2
Section 11378	2
California Penal Code	
Section 844	6, 7
Section 1531	6
Section 1538.5, subsection (a)	6
Section 1538.5, subsection (f)	2, 7
Section 1538.5, subsection (i)	2, 7
CASES	
Illinois v. Rodriguez 497 U.S. ___, 111 L.Ed.2d 148 (1990)	12, 13
Florida v. Jimeno, 500 U.S. ___, 114 L.Ed.2d 297 (1991)	12, 13
Schneckloth v. Bustamonte, 412 U.S. 218, 248 (1973)	12, 13
United States v. Lopez, 911 F.2d 1006 (5th Cir. 1990)	13, 14

No. 91-1426

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

THE PEOPLE OF THE STATE OF CALIFORNIA, Petitioner

v.

STEPHEN ROSS HARDEN, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL
SIXTH APPELLATE COURT

RESPONSE IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the California Court of Appeal, Sixth Appellate District, is unreported. A copy of the opinion is attached to the petition as Appendix A. The California Supreme Court's denial of petitioner's Petition for Review is attached to the Petition as Appendix B.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The petition involves the Fourth Amendment to the United States Constitution. That provision is set forth at page three of the petition.

STATEMENT OF THE CASE

Respondent Stephen Ross Harden, (hereafter "respondent) was charged with possession of methamphetamine for sale and possession of less than one ounce of marijuana. California Health and Safety Code section 11378 and section 11377(b). Clerk's Transcript, hereafter "CT", 296-297. Pursuant to California Penal Code section 1538.5(f) and (i) respondent moved at his preliminary hearing and again in the trial court to suppress the evidence against him as the fruit of an illegal search and seizure. Both courts denied respondent's motion. CT 1, 284-285, 292-294, 309, 350.

Subsequently, respondent pled guilty and was granted probation. CT 349, 353.

The California Court of Appeal, Sixth Appellate District, reversed the judgment on September 4, 1991. Petition Appendix A. The California Supreme Court denied petitioner's application for review on December 11, 1991. Petition Appendix B.

STATEMENT OF FACTS

Petitioner's Statement of Facts is generally accurate as a summary of the testimony heard by the magistrate. However, petitioner's Statement of the Facts implies that the complete testimony of the four police officers was accepted as accurate by the magistrate and the California Court of Appeal. This is not true. In fact, one of the most significant problems with this case is that the magistrate's ambiguous and incomplete findings of fact make it difficult to know exactly what testimony was believed by the magistrate. Respondent's Statement of Facts will attempt to clarify which "facts" are undisputed and which "facts" arise out of contradicted testimony.

THE TESTIMONY OF THE OFFICERS

On October 11, 1989, four Santa Clara police officers responded to a report of suspicious activity by the occupants of room 405 of the Woodmark Hotel. The night manager of the hotel made the report. Ct 6-7, 76, 111-112. The door to room 405 "was slightly ajar about one to one and a half inches." Ct 7, 25, 74, 167. "The outside edge of the door [was] even with the inside edge of the door jam." Ct 94. With the door in this position it was not possible to see into the room. Ct 7, 94. Officer Henry knocked on the door and the door swung open ten inches. Ct 7, 84, 94, 98, 168. Officer Henry saw someone sitting on the floor. Henry said "Hello," identified himself as a police officer investigating a report of suspicious circumstances, and asked permission to enter the hotel room. CT 8-9, 33-34, 169, 180.

Henry and another officer heard the occupants of the room give permission to enter; the other two officers who were further away, did not. CT 9, 33, 169, 75, 85, 94-95, 110.

The four officers entered the room. CT 9, 67, 94. The last officer to enter testified that he closed the door because it otherwise would have remained open. CT 96, 98. Petitioner, his two co-defendants, James Edward Bowen and Sindy Charlene Bowen and the Bowen's baby, were in the room. CT 14, 168-170. The officers noticed various items indicative of drug possession. CT 9-14, 71, 95-97, 171-172. Henry asked if there were any drugs in the room and was told "no." He asked Mr. Bowen for permission to search the room and was told "yes." CT 172.

The search of the room located both marijuana and methamphetamine. CT 18-20, 68-70, 106-108, 228.

THE DEFENDANTS' TESTIMONY

All three defendant's testified that they did not see the police officers or hear them knock on the door or identify themselves before entering the room. CT 246-251.

UNDISPUTED FACTS

On March 9, 1990, as part of the preliminary hearing, the magistrate conducted a view of the scene. CT 137,140. During this view, respondents investigator, Ken Condo, testified that he visited the Woodmark Hotel on November 10, 1989. He determined that the door to room 405 was a spring-loaded door which, when released, closed on its own. CT 144. Condo reenacted the officers' testimony by knocking on the door, but it did not swing

open 8 to 12 inches as described by the officers. CT 144-145. Instead, the door opened only an inch to an inch and a half before returning to its starting position. CT 146-147. Another harder knock did not open the door any further. CT 148. Even though the door swung open an inch and a half from its fully closed position, "the amount of light that is exposed or you can see during the knock from the edge of the doorjamb into the room" was only a quarter of an inch. CT 148-149. Appellant's attorney opened the door wide enough to permit entry. When released, the door closed on its own completely "including the latch mechanism engaging with the door inset." A repeat performance achieved the same result. CT 150.

The general manager of the hotel testified that the condition of the door had not changed since November 10th and that Condo had not tampered with the door at that time. Further, the manager was unaware of any maintenance work performed on the door since October 11, 1989. CT 153-154.

MAGISTRATE'S FINDINGS

Pursuant to California Penal Code section 1538.5[1] respondent challenged the entry into the hotel room as a violation of his Fourth Amendment rights.[2] Respondent's claim had two distinct components. Respondent alleged that the police had failed to comply with California's knock-notice statues[3] and that the entry itself violate respondent's Fourth Amendment rights. The magistrate ruled against respondent, but its ruling was based primarily on the officers' purported compliance with

---

[1] California Penal Code section 1538.5, subsection (a) provides:

A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds:

(1) The search or seizure without a warrant was unreasonable.

***

[2] Respondent also challenged the search of his person. The Court of Appeal did not reach this second issue and the issue is not before this court.

[3] California Penal Code section 844 provides:

To make an arrest, a private person, if the offense is a felony, and in all cases a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing the person to be, after having demanded admittance and explained the purpose for which admittance is desired.

California Penal Code section 1531 provides:

The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance.

the knock notice statutes.

Petitioner's summary of the magistrate's findings is incomplete and presents the findings in a light highly favorable to its position without capturing the true flavor of ambiguity present in the magistrate's actual statement. The magistrate's actual findings were as follows:

> And concerning then the 1538.5 motion and the 844 violation, I think counsel are inferring that I'm either going to have to accept the defendant's story that there was only a closed door which was unlocked that the police entered or that the police version is true, that they knocked and it swung open then inches. I don't think I'm restricted to that. I think that if I give as much credence to both sides as possible, possibly what happened is that the officers arrived, knocked, the door might have moved. I do not believe it moved ten inches. It might have moved a couple of inches. There might have been a brief view of someone sitting on the floor by one of the officers. I believe the officers did make the announcement they were required to make. Possibly the officers heard what they thought was yes, which would still give credence to the defendant's side of the story. So, I'm not in a position where I have to say one side is lying and therefore I accept the other side and make my decision based on that. I have to decide if there is sufficient evidence of compliance with the knock-notice rule, so that there was proper compliance, and I do find that there's enough evidence to determine there was compliance. There was a knock, there was an announcement of purpose, there was a -- even if the door opened on the knock, I do not consider that a breaking because if you knock on a door that is ajar and it opens, that is not an intent to enter, unless it is an intent to enter; in this case, I don't find it to be. I don't think the officer even knew what he would do when he knocked on it. Therefore I don't consider that a breaking. Before there was an entry, there was an announcement of purpose; even though "hello" was in there, I don't think that affects the sequence. Now whether the defendant said "yes" when they said, "may we enter or not," if in fact the officer reasonably believed he heard it, I think that justifies the entry.
>
> So I'll deny the motion and find that the knock-notice, there's sufficient evidence to find that the

knock-notice was complied with.

CT 284-285.

In addition, the court made factual findings concerning room 405 during the view of the scene. CT 146-153. These findings are reflected in the summary of undisputed facts above.

Petitioner explicitly states four factual findings purportedly made by the magistrate. Petition at 7. This summary is not accurate.

(1) The magistrate stated that the door "might have moved a couple of inches." CT 284 (Emphasis added.) The magistrate did not find that it did move a couple of inches. In the context of the magistrate's findings at the view of the scene where the door moved no more than an inch and a half even after a hard knock, it seems likely that the two inch figure was merely the magistrate's generous statement of the most the door could possibly have moved under any circumstances.

(2) Again, the magistrate stated that "there might have been a brief view of someone sitting on the floor." CT 284. (Emphasis added.) Furthermore, Officer Henry testified that he said "Hello" not that the person sitting on the floor said "Hello" as alleged by petitioner. CT 169, 180.

(3) & (4) Petitioner states that the magistrate found that "Officer Henry announced the officers' purpose and asked for permission to enter" and that the "officer believed he heard 'yes' from within." Petition at 7. However, when the magistrate stated that "the officers did make the announcement they were

required to make," he did so in the context of ruling that the officers had complied with the knock-notice rules, not in the context of holding that they asked for and received permission to enter. The magistrate's finding on the question of consent to enter was less decisive. The magistrate stated "[p]ossibly the officers heard what they thought was yes" and concluded that "if in fact the officer reasonably believed he heard [consent to enter], I think that justifies the entry." CT 285. However, the magistrate never explicitly found that the officers reasonably believed that they had received the consent to enter because it resolved the matter merely by finding compliance with the knock-notice rules. CT 285.

REASONS FOR DENYING THE PETITION

1. In its arguments before the magistrate and in its respondent's brief filed with the Court of Appeal, petitioner argued only that the defendants had consented to the police entry into the hotel room. Petitioner's argument that the entry could be justified based upon the police officers' reasonable belief in the existence of consent was first raised in petitioner's petition for review filed with the California Supreme Court.

According to California Rules of Court 29, subsection (b):

> As a matter of policy, on petition for review the Supreme Court normally will not consider:
>
> (1) any issue that could have been but was not timely raised in the briefs filed in the Court of Appeal
>
> (2) any issue or any material fact that was omitted from or misstated in the opinion of the Court of Appeal, unless the omission or misstatement was called to the attention of the Court of Appeal in the petition for rehearing. All other issues and facts may be presented in the petition for review without the necessity of filing a petition for rehearing.

Thus, under California law, an issue that is not raised until after the Court of Appeal reaches its decision is considered waived and will not be considered by the California Supreme Court. See Estate of MacDonald, 51 Cal.3d 262, 267 n. 5 (1990) and People v. Cookson, 54 Cal.3d 1091, 1100 (1991). Furthermore, insofar as petitioner objects to the statement of facts in the opinion of the Court of Appeal, petitioner has waived any such objection by failing to file a petition for rehearing in that court. Because this issue was not raised in a timely fashion

before the California courts, this court should also decline to consider it.

2. Because the facts of this case are very confused it does not represent an appropriate vehicle for consideration of the issue raised by petitioner. The fact-finding magistrate reached his decision without directly considering the legality of the entry because he focused on the police officers' compliance with the California knock-notice statutes. In doing so, the magistrate failed to make the clear factual findings necessary to a proper resolution of the issue raised by petitioner.

As indicated in respondent's statement of facts, respondent argued this case before the magistrate both as an illegal entry and as a violation of California's knock-notice statutes. Apparently, the magistrate concluded that the officers had complied with the knock-notice rules and never explicitly ruled on whether the officers had received consent to enter. In fact, the magistrate expressly refused to make explicit factual findings on the credibility of the witnesses and their conflicting testimony on the question of consent.

On appeal, respondent did not raise the knock-notice issue because it did not appear relevant. The California knock-notice statutes apply only when officers are entering a residence to make an arrest or pursuant to a warrant. At the time of their initial entry, these officers had no warrant and no probable cause to arrest. Thus, the issue is not their compliance with the knock-notice statutes, but the legality of the entrance

itself -- specifically the existence or lack thereof of consent to enter.

In its opinion, the California Court of Appeal focused on the magistrate's express refusal to find the defendant's testimony not credible. Based upon this refusal, the Court of Appeal properly concluded that the State of California had not met its burden of proving that the officers had received consent to enter. Petition at A-13. Petitioner's arguments notwithstanding, the Court of Appeal never expressly ruled that the police officers reasonably believed they had received consent to enter. The Court of Appeal merely disagreed with the magistrate's conclusion "that the officers' belief that permission had been given was sufficient to justify a non-consented to, warrantless entry." Petition at A-11. However, this disagreement is a far cry from finding that the officers believed that they had received consent to enter, much less that their belief was reasonable.

In fact, a review of the evidence suggests that no reasonable belief that consent had been given could possibly exist. As stated by the Court of Appeal, "[t]he magistrate specifically refused to find that either the police or defendants were lying." Petition at A-11. The defendants testified that they did not hear, see, or speak with the police officers prior to the officer's entry into the hotel room. Apparently, the magistrate believed this testimony. The magistrate also found that the door to room 405 had not swung open 10 inches as claimed

by the officers. Thus, according to the Court of Appeal, "the magistrate indicated that he did not believe any of the four officers' testimony that the door was knocked open ten inches." Petition at A-10. If the door did not swing open 10 inches, the entire version of the events described by the officers is suspect. Under these circumstances it is hard to imagine how these police officers could have held a reasonable belief that they had received consent to enter.

3. Petitioner argues that under current law courts have difficulty determining "whether officers lawfully relied on consent' to enter because they must choose "between two conflicting standards enunciated by this Court." Petition at 10. Petitioner is incorrect. This court has not announced two conflicting standards.

Schneckloth v. Bustamonte, 412 U.S. 218, 248 (1973) states the general rule concerning the validity of a consensual search:

> We hold only that when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied.

Petitioner suggests that this rule somehow conflicts with two recent cases: Illinois v. Rodriguez 497 U.S. ___, 111 L.Ed.2d 148 (1990) and Florida v. Jimeno, 500 U.S._____, 114 L.Ed.2d 297 (1991). Respondent finds no conflict between Schneckloth, Rodriguez, and Jimeno.

In Rodriguez, police gained entry into the defendant's apartment with the assistance and consent of the defendant's ex-

girl friend who did not, in fact, have the authority to give such consent. 111 L.Ed.2d at 155-156. This court reversed the lower court and held that "a warrantless entry is valid when based upon the consent of a third party whom the police, at the time of the entry, reasonably believe to possess common authority over the premises, but who in fact does not do so. 111 L.Ed.2d at 155.

Similarly, in Jimeno this court ruled that when a defendant consents to a search of his car the Fourth Amendment is not violated by a search of a closed container in the car when: "it is objectively reasonable for the officer to believe that the scope of the suspect's consent permitted him to open a particular container within the automobile." 114 L.Ed.2d at 301.

Petitioner claims that Rodriguez and Jimeno establish an alternative reasonableness test for the existence of consent -- a test petitioner claims conflicts with Schneckloth. Petitioner is mistaken, however. In Rodriguez and Jimeno the police actually received consent meeting the requirements of Schneckloth -- consent that was "in fact voluntarily given." The disputed issue in Rodriguez and Jimeno concerned the authority of the consenter to give consent and the scope of the consent, respectively. This court's rulings on how these distinct issues should be resolved does not indicate the existence of a second consent test which conflicts with Schneckloth.

Petitioner claims that the two consent tests have coexisted over the past two years with the various courts simply choosing sides as to which test to apply. Petition at 16. In support of

this contention petitioner cites a number of cases. However, only three of these cases are cited by petitioner as using the Rodriguez test to the exclusion of the Schneckloth test and only one of these cases actually does so. Furthermore, in none of these cases would the strict application of the Schneckloth test have produced a different result.

Petitioner cites United States v. Lopez, 911 F.2d 1006 (5th Cir. 1990), as a case where "[t]he court held it was reasonable for the officer to believe consent was given" and where "[t]he opinion omits mention of Schneckloth's requirement that prosecution prove consent was, in fact, voluntarily given." Petition at 17-18. Petitioner's summary of Lopez is misleading and incomplete. In Lopez the border patrol agent testified that the defendant had consented to the search. The defendant testified that he had not. The magistrate believed the agent. Thus, Lopez is not a case of reasonable belief in consent versus actual consent, but a case where both are present. More importantly, petitioner's claim that Lopez omitted mention of the Schneckloth test is not correct. In fact Lopez cites Schneckloth:

> A search by consent is a well-recognized exception to the usual warrant requirement. Schneckloth v. Bustamonte, 413 U.S. 218, 218-219, 93 S.Ct. 2041, 2043-44, 36 L.Ed.2d 854 (1973); United States v. Davis 749 F.2d 292, 294 (5th Cir. 1986). Such consent must be given voluntarily and not simply in acquiescence to a claim of lawful authority, see Schneckloth, 412 U.S. at 248, 93 S.Ct. at 2058; and a determination that consent was voluntarily given is a finding of fact to be made in light of all the circumstances. Schneckloth, 412 U.S. at 248-9, 93 S.Ct. at 2058-59; United States v. Gonzalez-Basulto, 898 F.2d 1011, 1012-13 (5th Cir.

1990).

911 F.2d at 1010.

Lopez does not support petitioner's claim that courts are choosing sides or that the Fifth Circuit has chosen to apply a new Rodriguez test instead of the Schneckloth test.

According to petitioner, in People v. Henderson, 568 N.E.2d 1234, 1254 (Ill. 1990), the Illinois court ruled that "Rodriguez controls where the issue is whether consent was given, but not where the issue is whether the consent was voluntary." Petition at 18. Although petitioner accurately summarizes the holding of the Illinois court, the court did not actually have to consider the reasonableness of the police officers' actions. In Henderson the defendant's mother was found to have consented to a police entry based upon her gestures and actions while remaining silent. In other words, based upon a reasonable interpretation of defendant's mother's actions the Illinois courts found that consent to enter had actually been given. Thus, the reasonableness of the polices' beliefs was not relevant to any issue in Henderson and the Illinois court did not use a new, distinct Rodriguez test that conflicts with Schneckloth.

Similarly, Wilkerson v. State, 594, A.2d 597 (Md.App.1991), involved a case where consent to search the defendant's car had actually been given. At the suppression hearing, the defendant claimed that "he wanted to revoke [the consent]...but did not feel free to do so." 594 A.2d at 604. Obviously, in the absence of any explicit revocation the defendant's consent remained

valid. The court relied upon Rodriguez to establish that it was reasonable to rely upon the actual, voluntary consent given by the driver of a car to a search of that car. The defendant also argued that the consent to search the car did not include consent to search containers within the car. However, the Maryland Court rejected this argument in direct reliance on Jimeno. 594 A.2d at 604-605. The Maryland Court made expansive statements in reliance on Rodriguez and Jimeno, that after Rodriguez the question is not whether the defendant voluntarily consented to the search of his car, but whether the police officer reasonably believed the defendant had consented to the search. 594 A.2d at 602-603. These statements were misguided and unnecessary. In Wilkerson, the driver actually and voluntarily consented to a search of the car including containers within the car. No examination of the reasonable beliefs of the police officer was warranted or necessary.

Petitioner's attempt to apply the rule of Rodriguez and Jimeno to this case arises out of a fundamental misinterpretation of the nature of the Fourth Amendment. Petitioner understands the Fourth Amendment to permit consensual searches whenever a police officer reasonably believes he has received consent to conduct a search. However, as explained in Jimeno:

> The touchstone of the Fourth Amendment is reasonableness. Katz v. United States, 389 US 347, 360, 19 L.Ed.2d 576 88 S.Ct. 507 (1967). The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable. Illinois v. Rodriguez, 497 US--, 111 1.Ed.2d 148, 110 S.Ct. 2793 (1990). Thus, we have long approved consensual searches because it is not doubt

> reasonable for the police to conduct a search once they have been permitted to do so. Schneckloth v. Bustamonte, 412 US 281, 219, 36 L.Ed.2d 854, 93 S.Ct. 2041 (1973). The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of "objective" reasonableness - what would the typical reasonable person have understood by the exchange between the officer and the suspect? Illinois v. Rodriguez, supra at ----, 111 L.Ed.2d 148, 110 S.Ct. 2793; Florida v. Royer, 460 US 491, 501-502, 75 L.Ed.2d 229, 103 S.Ct. 1319 (1983) (opinion of White, J.); id., at 514, 75 L.Ed.2d 229, 103 S.Ct. 1319 (Blackmun, J., dissenting).

114 L.Ed.2d at 302.

In other words, the constitutionality of a search under the Fourth Amendment is based not upon reasonableness of the police officer's beliefs or actions but upon the reasonableness of the search itself. Obviously, in many cases the two will coincide. Unreasonable police actions will usually lead to unreasonable searches and seizures. Reasonable police behavior will usually lead to reasonable searches and seizures. But not all cases fit this usual pattern and this is one of the unusual cases. Even if the police reasonably believe they had received consent to enter the hotel room, this the search was not reasonable. The "typical reasonable person" described in Jimeno would not have found the entry into the hotel room reasonable when the occupants of the room credibly testified that they did not see or hear the police officers prior to their entry into the room.

4. Petitioner suggests that Bumper v. North Carolina, 391 U.S. 543, 20 L.Ed.2d 797 (1968) and Schneckloth can be reconciled with Rodriguez and Jimeno by assuming that Bumper and Schneckloth speak to police officers while Rodriguez and Jimeno speak to

judges. As discussed above, the conflict between these cases is more in petitioner's mind than in the cases themselves. However, even if the conflict were real, petitioner's suggested solution is no solution at all. Jimeno, for example, clearly speaks to police officers, as well as judges, by telling them that under normal circumstances a consent to search a car for drugs includes consent to search containers within the car.

More importantly, petitioner's suggestion that courts should not attempt to determine whether a person knowingly and voluntarily consented to a search threatens to eviscerate the Fourth Amendment. If the only test a court can apply to determine the legality of a search is whether the police behaved reasonably, the scope of the amendment will be steadily eroded under the pressures of creeping reasonableness. Every borderline search or seizure which is upheld as reasonable will establish a new standard of reasonable behavior, pushing back the range of acceptable behavior until the next case comes along to establish yet another clear and more expansive example of reasonable behavior.

5. Finally, the various legal issues and arguments in this case should not distract this court from one central fact. The view of the scene and the magistrate's findings clearly established that the police officers testified to events that did not and could not have happened. The magistrate went out of his way to avoid stating that the police officers lied, but that does not change the underlying reality of the situation. Under such

circumstances this court should not ever consider taking this case. To do so would send an appalling message to law enforcement personnel throughout the country that the United States Supreme Court does not care whether police officers testify honestly and accurately.

CONCLUSION

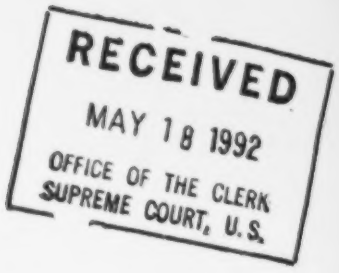
For the reasons discussed above, we respectfully request the that Petition for Writ of Certiorari be denied.

May 14, 1992

RUDY KRAFT

SIXTH DISTRICT APPELLATE PROGRAM

Attorneys for Respondent



No. 91-1426

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

THE PEOPLE OF THE STATE OF CALIFORNIA, Petitioner

v.

STEPHEN ROSS HARDEN, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL
SIXTH APPELLATE COURT

CERTIFICATE OF SERVICE BY MAIL OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS BY RESPONDENT

RUDY KRAFT
P.O. Box 225
Cutten, CA 955334
(707) 445-5486
(Counsel of Record)

SIXTH DISTRICT APPELLATE PROGRAM
100 N. Winchester Blvd.
Santa Clara, CA 95050
(408)

Attorneys for Respondent

CERTIFICATE OF SERVICE BY MAIL

THE PEOPLE OF THE STATE OF CALIFORNIA

Petitioner,

v.

STEPHEN ROSS HARDEN

Respondent.

RUDY KRAFT, counsel for respondent, states:

1) That his membership application to the Bar of the Supreme Court of the United States is submitted contemporaneously herewith;

2) That his business address is P.O. Box 225, Cutten, California, 95534-0225 in the City of Cutten, and County of Humboldt, State of California; that on May 14, 1992, he served true copies of the attached Motion for Leave to Proceed in Forma Pauperis by Respondent in the above-entitled matter on counsel for the petitioner by placing same in an envelope addressed as follows:

Michael E. Banister
Deputy Attorney General
455 Golden Gate Avenue, Room 6200
San Francisco, CA 94102

Said envelope was then sealed and deposited in the United Stated mail at Cutten, California with the postage thereon fully prepaid.

I swear under penalty of perjury that the foregoing is true and correct.

RUDY KRAFT
Attorney for Respondent

Subscribed and sworn to before me this 14 day of May, 1992.

CHRISTINE SINTIC
Comm. # 963686
NOTARY PUBLIC - CALIFORNIA
Humboldt County
My Comm. Expires Apr. 6, 1996

No. 91-1426

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

THE PEOPLE OF THE STATE OF CALIFORNIA, Petitioner

v.

STEPHEN ROSS HARDEN, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL
SIXTH APPELLATE COURT

CERTIFICATE OF SERVICE BY MAIL OF RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RUDY KRAFT
P.O. Box 225
Cutten, CA 955334
(707) 445-5486
(Counsel of Record)

SIXTH DISTRICT APPELLATE PROGRAM
100 N. Winchester Blvd.
Santa Clara, CA 95050
(408)

Attorneys for Respondent

CERTIFICATE OF SERVICE BY MAIL

THE PEOPLE OF THE STATE OF CALIFORNIA

Petitioner,

v.

STEPHEN ROSS HARDEN

Respondent.

RUDY KRAFT, counsel for respondent, states:

1) That his membership application to the Bar of the Supreme Court of the United States is submitted contemporaneously herewith;

2) That his business address is P.O. Box 225, Cutten, California, 95534-0225 in the City of Cutten, and County of Humboldt, State of California; that on May 14, 1992, he served true copies of the attached Response in Opposition to Petition for Writ of Certiorari in the above-entitled matter on counsel for the petitioner by placing same in an envelope addressed as follows:

Michael E. Banister
Deputy Attorney General
455 Golden Gate Avenue, Room 6200
San Francisco, CA 94102

Said envelope was then sealed and deposited in the United Stated mail at Cutten, California with the postage thereon fully prepaid.

I swear under penalty of perjury that the foregoing is true and correct.

RUDY KRAFT
Attorney for Respondent

Subscribed and sworn to before me this 14 day of May, 1992.

CHRISTINE SINTIC
Comm. # 963686
NOTARY PUBLIC - CALIFORNIA
Humboldt County
My Comm. Expires Apr. 6, 1996